In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 880

EMMANUAL BLAZ MRKONJIC-RUZIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ADDITIONAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted on the question of the effect of this Court's decision in *Alderman* v. *United States,* No. 133, O.T., 1967, decided March 10, 1967, on the disposition of this case.

In a Supplemental Memorandum For the United States which we recently submitted in this case we advised the Court that on one occasion petitioner participated in a conversation that was overheard during the course of a surveillance conducted for the gathering of foreign intelligence information and we submitted the log of that surveillance to the Court for

836-440—69

in camera examination. The surveillance in question was specifically authorized by the Attorney General.

In our Supplemental Memorandum we asked the Court to examine the one and a half line log entry concerning this overhearing of petitioner to satisfy itself that the overhearing had no possible relation to the prosecution of petitioner. We continue to urge the Court to examine this log and to deny certiorari on the basis of its *in camera* determination that the overheard conversation was totally unrelated to the prosecution.

We recognize that the position which we urge here is not consistent with this Court's recent decision in *Alderman*. We ask the Court, however, to recognize a narrow exception to the disclosure rule of *Alderman* for those instances such as that here, where it is apparent from the nature of the premises subject to the surveillance that the surveillance was being conducted for the purpose of gathering foreign intelligence information. See Petition for Rehearing, *Ivanov* v. *United States*, No. 11, this Term.

The surveillances which have been authorized for gathering foreign intelligence information are not intended to provide evidence for use in criminal prosecutions.[1] Yet, within recent months, we have uncovered at least five cases pending in some appellate stage, one case pending on indictment and two investigations in which persons who have been prosecuted or are under

[1] Indeed, we originally anticipated that only rarely during such a surveillance would someone involved in a criminal prosecution be overheard. See Brief for the United States, *Alderman* v. *United States*, No. 133, O.T., 1967, p. 5.

investigation have at one time or another stumbled into an electronic surveillance being conducted to gather foreign intelligence information and participated in a conversation that was overheard. The case of the petitioner here is typical of this type of incident. See also Additional Memorandum for the United States, *Clay* v. *United States,* No. 271, this Term.

In this case, the petitioner, on one occasion five years before the date of the crime charged in the indictment, fell into an electronic surveillance and was overheard participating in one brief conversation. It is apparent from an examination of the one and a half line surveillance log entry reflecting that conversation that the overhearing of the conversation could not possibly have provided evidence against the petitioner. It would not take a trial judge five minutes to make that determination. Yet, it is also apparent from an examination of that log that the government could not disclose, except to a court,[2] where this conversation was overheard.

To say in such cases that the government must either disclose or dismiss is, in practical terms, to provide the defendant with immunity from prosecution for all crimes past, present or future. For if the government can not make an "ex parte determination of relevancy" (*Kolod* v. *United States,* 390 U.S. 136,

[2] The governemnt did in one instance advise a defendant in a criminal case that he had been overheard during the course of such a surveillance. Although the Court issued a protective order prohibiting the defendant or his counsel from disclosing that information, two weeks after the disclosure was made an article appeared in the newspapers reciting the facts of the surveillance.

137) it would have to disclose or dismiss in any case involving that defendant, regardless of how far removed that prosecution was from the time and place of the surveillance, and it is equally clear that disclosure could never be made.

In the opinion of the court in *Alderman* v. *United States,* No. 133, O.T. 1967, Mr. Justice White noted "the matter comes down to a judgment whether *in camera* inspection would *characteristically* be sufficiently reliable when national security interests are at stake" fn. 15 [emphasis added]. The court's opinion apparently resolves the issue on the basis of the superiority of the adversary system "where an issue must be decided on the basis of a large volume of factual materials" and in order to guard "against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in or suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." The court also noted that its resolution "will avoid an exorbitant expenditure of judicial time and energy and will not unduly prejudice * * * the public interest" and that since the disclosure will normally involve only the defendant's own conversation "disclosure should therefore involve a minimum hazard to others." It is clear that in cases such as this, where there is a brief overhearing during the course of a surveillance being conducted to gather foreign intelligence information, these considerations relied on by the Court in *Alderman* are not present.

Since experience indicates that such instances of a criminal defendant stumbling briefly into a foreign

intelligence surveillance will not be infrequent, we submit that, where the overhearing of defendant was obviously inadvertent and the matter can be easily and quickly resolved by the district judge, a limited exception to the adversary rule of *Alderman* should be recognized if it is apparent from the nature of the premises that the surveillance was being conducted to obtain foreign intelligence information and that the government could not disclose that surveillance to the defendant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE 1969